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In the Supreme Court of the United States
October Term 1967

TENNESSEE PACKERS, INC., FROSTY MORN DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Tennessee Packers, Inc., Frosty Morn Division, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 21, 1967.

OPINION BELOW

The opinion below by the United States Court of Appeals for the Sixth Circuit is as yet unreported and a certified copy of such opinion as appended to this petition as Appendix A hereto. In addition, the opinion of the National Labor Relations Board, the administrative agency in the case, is appended to this petition as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 21, 1967, and is appended to this petition (infra, Appendix B). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1). An order staying mandate of the said judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 7, 1967 (infra, Appendix D).

QUESTIONS PRESENTED

1. Did the National Labor Relations Board act arbitrarily and capriciously in setting aside a representation election for a reason not specified by the objector in its objections.

2. Was the Petitioner foreclosed in the subsequent unfair labor practice hearing from introducing evidence contesting the accuracy of the Board's earlier ruling, made without a hearing, in setting aside the representation election.

STATUTE AND REGULATIONS INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*); the relevant provisions of which are as follows:

"Sec. 8(a) It shall be an unfair labor practice for an employer—"

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

(29 U.S.C. Sec. 158(a)(5))

* * *

"Sec. 10(e) The Board shall have power to petition any court of appeals in the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate

United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(29 U.S.C. Sec. 160(e))

* * *

The rules and regulations of the National Labor Relations Board involved are, as follows:

Sec. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. Any party may

be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to section 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the result of the

matter forthwith upon the record or may make election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of execptions to such report, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the

other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.

(29 C.F.R. 102.69)

STATEMENT

The National Labor Relations Board conducted a representation election among Petitioner's employees in September, 1963, to determine if they wished to be represented by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 405. The union did not receive a majority of the votes counted and filed timely objections to employer conduct occurring prior to the representation election which conduct the union alleged interfered with the employees free choice of voting. The particular employer conduct complained of in the union's objections was that "employees were called together for a so-called 'safety meeting' and at that time were told by management officials to sign a petition stating that they did not want a union" (B.A. 130a). The Board found this objection to be without merit; however, based upon evidence acquired during the investigation of this allegation the Board found a different violation. Accordingly, the Board set aside the election based upon the finding that Petitioner's action in changing the working rules of its truck drivers prior to the election constituted interference with the election (B.A. 136a-138a).

The Board's ruling was made ex parte without a hearing. Petitioner filed timely exceptions to the Board's ruling but was not permitted an opportunity to present evidence at a hearing for the reason that no substantial and material issues were raised requiring a hearing.

The Board ordered a second representation election

which was conducted in June, 1964, at which a majority of Petitioner's employees voted in favor of union representation. Petitioner refused to bargain with the union and the Board filed an unfair labor practice proceeding against Petitioner. During the unfair labor practice proceeding Petitioner attempted unsuccessfully to introduce evidence relating to the Petitioner's action in changing the working rules of its truck drivers.

REASONS FOR GRANTING THIS WRIT

1. To Petitioner's knowledge this Court has not heretofore considered the contention that the National Labor Relations Board in setting aside a representation election should rely on a specific objection which has been filed to the conduct of the election. If the Board acts contrary to its rules and regulations in this regard, 29 C.F.R. 102.69, an objecting party could have the Board do the objector's investigative work for him simply by filing the most general and vague objections.

2. The question of whether a party should be foreclosed from presenting evidence during an unfair labor practice hearing on the theory that the National Labor Relations Board is bound by its own prior determinations in the earlier representation proceedings concerns what Petitioner considers to be a seeming misapplication by the National Labor Relations Board of this Court's ruling in *Pittsburgh Plate Glass*, 313 U.S. 146, 161-162. Petitioner submits that the National Labor Relations Board itself originally recognized that the rule in *Pittsburgh Plate Glass*, supra,

was limited to preventing relitigation of issues which could have been presented at a prior representation hearing. *Sixth Annual Report of the National Labor Relations Board* (1941), p. 85.

Because Petitioner had never been given an opportunity to introduce its evidence, Petitioner contends that under this Court's ruling in the *Pittsburgh Plate Glass* case, supra, it was reversible error to foreclose Petitioner from introducing its relevant evidence in the unfair labor practice proceeding. Accordingly, Petitioner submits that this Court should grant Petitioner's subject application to prevent the continued misapplication by the National Labor Relations Board of a prior ruling made by this Court.

CONCLUSION

For the foregoing reasons Petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT BELOW

Decision of the United States Court of Appeals
For the Sixth Circuit in No. 17, 125

Decided June 21, 1967.

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

CECIL, *Senior Circuit Judge.* This cause is before the Court upon petition of the National Labor Relations Board for enforcement of its order, issued August 5, 1965, against respondent, Tennessee Packers, Inc., Frosty Morn Division. The Court has jurisdiction of the proceeding, the alleged unfair labor practices having occurred in Clarksville, Tennessee, within this judicial circuit. Section 160(e), Title 29, U.S.C. The Board determined that the respondent committed unfair labor practices in violation of Sections 158(a)(1) and (5), Title 29, U.S.C., by refusing to bargain with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 405 (the union), which had been certified by the Board as the exclusive bargaining representative of respondent's employees. The respondent, a Tennessee corporation, engaged in the business of processing and packaging meat products, admits its refusal to bargain, but contends that the Board's certification of the union was invalid.

The union filed a petition for a representation elec-

tion with the Board on August 26, 1963. On September 13, 1963, the respondent and the union entered into a "Stipulation for Certification Upon Consent Election." The election took place, as scheduled, on September 27th and 28th, 1963. The vote was 117 to 115 in favor of the union. Thirty-five votes were challenged. On October 2, 1963, the union filed objections to conduct of the respondent which it alleged occurred immediately preceding the election and prevented the employees from exercising a free and uncontrolled choice. The union sought to have the election set aside and a new election ordered by the Board. Seven acts of misconduct were enumerated. Only the fourth objection need be considered here. The Regional Director recommended that the others be overruled and the Board sustained the recommendation. It was alleged in the fourth objection that,

> "Employees were called together for a so-called 'safety meeting' and at this time were told by management officials to sign a petition stating that they did not want a union."

The Director reported to the Board on December 6, 1963. As to the challenged ballots, the Director recommended that seventeen of the challenges be sustained and those ballots not be counted. He further recommended that sixteen of the ballots be counted, the challenges being overruled as to them. No determination was made with reference to the challenges to the ballots of Black and Lane, since actions involving them were pending before the Board.

With reference to objection four, the Director reported that his investigation revealed that at about three weeks before the election, one of the respondent's drivers approached Superintendent Barnes and com-

plained that some drivers were "laying out" when they did not want to take a particular run. Barnes appointed a committee of four drivers to draw up a set of proposed rules to remedy the situation. These drivers met and drew up a set of proposed rules which were submitted to management. About two weeks before the election, representatives of management met with the drivers in the conference room of the employer's plant. The drivers arrived at the conference room before the representatives of management. While waiting, an anti-union petition was circulated among the drivers and funds were solicited for buttons and literature to be circulated among the rank and file employees. This discussion stopped when supervisors arrived. At this meeting, in the presence of management, the proposed rules were adopted by the drivers and they were approved by Barnes. The rules concerned sleeping hours and provided penalties for missing assigned runs.

The Director found that the drivers were dissatisfied with existing conditions, that the rules were for the admitted purpose of remedying the situation, that they affected working conditions and were a benefit to employees. He held that dealing directly with employees and granting benefits during the course of a union's organizing campaign constitutes interference with an election. He recommended that objection four be sustained on the basis of the facts adduced by his investigation.

The Director's concluding recommendation to the Board was that the sixteen ballots to which challenges were overruled be opened and counted. He further recommended that if the revised tally of ballots did not show a majority of votes favorable to the union, the election should be set aside because of the conduct of

the respondent in accordance with his findings on objection four.

On December 13, 1963, the respondent filed exceptions to the Director's report. Its first exception was that the Director's findings were not responsive to the objection made by the union; that the finding that the rules effected a change in working conditions is "based on no facts disclosed by the Report;" and that there was "no showing that Management granted "improved working conditions to the drivers' or that Management was dealing directly with employees and granting benefits in the course of a union's organizing campaign, and thus interfered with an election." In its second exception, the respondent raises the question as to whether the alleged misconduct found in objection four occurred before August 26, 1963, the cut-off date before which the respondent could not be charged with interfering with an election. See *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453. Respondent, in its exceptions, did not request a hearing before the Board.

No hearing was held by the Board to consider the exceptions of the respondent and on May 6, 1964, the Board issued its decision affirming the findings of the Director and approving his recommendations. The Board noted "the absence of any adequate explanation by the Employer as to why it did not defer its granting of this benefit until after the election." The Board overruled the challenges to the ballots of Black and Lane on the ground that the Board had found that they were dismissed from their employment because of union activities. Thus, there were eighteen valid votes to be counted. The Board ordered these ballots counted and issued a contingent order directing that the election be set aside and a second one held in the event that the new tally did not give the union a majority of the votes.

The union lost the election under the revised tally and in accordance with the contingent order of the Board a second election was held on June 19th and 20th, 1964. Of the 294 votes cast in this election, 140 were for the union, 115 against the union, and 39 were challenged. Among the challenged ballots were seven cast by truck drivers, employed by respondent who did not operate out of or reside in Clarksville. On July 2, 1964, the Director ordered a hearing for the purpose of determining the eligibility of the voters whose ballots were challenged.

There was a hearing before a Hearing Examiner, at which both parties were given an opportunity to be heard. The Examiner overruled challenges to twenty-four ballots, including those of the seven out-of-town drivers. He sustained challenges to fifteen of the contested ballots. Both the union and the respondent filed exceptions to the findings and recommendations of the Examiner. The Board issued its order on December 11, 1964, by which it sustained twenty-one challenges and overruled eighteen. It reversed the Hearing Examiner and sustained the challenges to the seven out-of-town truck drivers. Since the eighteen ballots would not affect the outcome of the election, the Board did not order them opened and counted. The Board then recognized the majority status of the union and certified it as the exclusive bargaining representative of respondent's employees.

The union filed a charge on March 11, 1965, for failure to bargain, and on April 5th the Regional Director issued a complaint alleging that the respondent, after numerous requests to bargain collectively, has refused to do so, in violation of Section 158(a)(5) and (1), Title 29, U.S.C. In its answer the respondent admitted that it refused to bargain with the union.

The Board's General Counsel moved for judgment on the pleadings, and the Trial Examiner issued an order to show cause why such motion should not be granted. The respondent then amended its answer to challenge the validity of the certification. Respondent alleged that the first election was unlawfully set aside, and that the Board erroneously disposed of certain challenges following the second election. On June 10, 1965, the Trial Examiner issued his recommended decision in which he denied respondent a hearing on the certification issues, and found that respondent had violated Sections 8(a)(5) and (1) of the Act (Section 158(a)(5) and (1) of the Act (Section 158(a)(5) and (1), Title 29, U.S.C.) by its admitted refusal to bargain with the union.

On August 31, 1965, the Board affirmed the Trial Examiner's refusal to permit the respondent to relitigate its objections previously considered by the Board in the certification proceedings. The Board ordered respondent to cease and desist from refusing to bargain in good faith with the union, and affirmatively required the respondent to bargain with the union upon request and to post appropriate notices. The Board petitions for enforcement of the order.

Respondent assigns as error the failure of the Board to afford it a hearing on the issues raised in the Board's determination to set aside the first election. Respondent claims that either the Regional Director or the Board erred in not holding a hearing at some stage in these proceedings before setting aside the election.

The consent election agreement signed by the parties provided that "hearing and notice thereof, Direction of Election, and the making of Findings of Fact and Conclusions of Law by the Board prior to the election are hereby expressly waived." This provision brings

the agreement within the ambit of Section 102.62(b) of the Board's Rules and Regulations,[1] (29 C.F.R. 102.62(b).) Section 102.69(c), 29 C.F.R. states that if objections are filed to "conduct affecting the result of the election" the Regional Director shall investigate them, and, "if a consent election has been held pursuant to Section 102.62(b)," prepare a report which shall be forwarded to the Board. This procedure differs from that used following an election held other than in pursuance of a 102.62(b) consent election agreement, where the Regional Director may hold a hearing to resolve any "substantial and material factual issues" that may exist. 29 C.F.R. 102.69(c).[2]

Section 102.69(e)(1), 29 C.F.R., provides that:

> "In a case involving a consent election held pursuant to Section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and * * * it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer."

---

[1] "Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary."

[2] "If the election has been conducted pursuant to a direction of election issued following any proceeding under Section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to Section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director."

Thus only in those instances in which the exceptions raise "substantial and material factual issues," may the Board order the Regional Director to direct a hearing on the exceptions. The respondent alleges that his exceptions do raise "substantial and material factual issues" requiring a hearing.

In order to raise "substantial and material factual issues," it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director. *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F.2d 199 (C.A. 7); *N.L.R.B.* v. *J. R. Simplot Company*, 322 F.2d 170 (C.A. 9); *Macomb Pottery Company* v. *N.L.R.B.*, No. 15675, decided April 18, 1967 (C.A. 7); *N.L.R.B.* v. *J. J. Collins' Sons, Inc.*, 332 F.2d 523 (C.A. 7); *N.L.R.B.* v. *Sun Drug Co.*, 359 F.2d 408 (C.A. 3). It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or concluions. *N.L.R.B.* v. *National Survey Service, Inc., supra; N.L.R.B.* v. *J. R. Simplot Company, supra; Macomb Pottery Company* v. *N.L.R.B., supra.* Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the

absence of specific assertions of error, substantiated by offers of proof.

The purpose behind the rule which requires a hearing only when "substantial and material factual issues" are raised is to avoid lengthy and protracted proceedings, and eliminate unnecessary delays in certifying the results of an election. If a hearing is required to be held on all exceptions to an election or report of a Regional Director, it would unduly lengthen and prolong labor unrest, contrary to the very purposes of the National Labor Relations Act. The cases relied upon by respondent in support of its contention that it is entitled to a hearing, all deal with cases in which the court determined that "substantial and material factual issues" were raised, and therefore held that the Board erred in not ordering a hearing. *United States Rubber Company* v. *N.L.R.B.*, No. 23208, decided February 20, 1967 (C.A. 5); *N.L.R.B.* v. *Capitol Bakers, Inc.*, 351 F.2d 45 (C.A. 3); *N.L.R.B.* v. *Joclin Mfg. Co.*, 314 F.2d 627 (C.A. 2); *N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 300 F.2d 671 (C.A. 4); *N.L.R.B.* v. *Dallas City Packing Co.*, 230 F.2d 708 (C.A. 5); *N.L.R.B.* v. *Poinsett Lumber and Mfg. Co.*, 221 F.2d 121 (C.A. 4). In *N.L.R.B.* v. *Sidran*, 181 F.2d 671 (C.A. 5), cited by respondent, the Court could only have held that the Board erred in denying a hearing if "substantial and material factual issues" were raised.

Respondent's exceptions to the report of the Regional Director filed December 13th, as heretofore described, do not state specific objections or indicate that factual issues exist. They do not clearly put in issue the correctness of the Director's findings, but merely attack the correctness of his conclusions and inferences drawn from the facts uncovered in his investigation.

It was proper for respondent question the conclusions of the Director, but to require a hearing it was incumbent upon it to state what evidence it would produce to establish that the conclusions were incorrect. Respondent fails to suggest any material facts which would be developed at a hearing. A hearing "would not deal with matters of factual proof but would serve only to permit argument which could as well have been presented in the writing itself." *N.L.R.B.* v. *J. R. Simplot Company, supra.*

Respondent does intimate that the statement in the report that the truck driver approached respondent's superintendent "approximately three weeks before the election" is incorrect. To support this assertion, respondent relies upon an affidavit furnished the Director by Superintendent Barnes, in which Barnes states that this initial encounter "occurred but a short time before the election, possibly three weeks or a month." Even taking the longest period of time suggested by the statement, one month, the meeting occurred at the earliest on August 27, 1963, after the filing of the petition for representation. In addition Respondent's exception to this finding is no more than a statement that it is "highly speculative," and does not state, or offer any proof to show that the encounter occurred on a day prior to filing the representation petition. Moreover respondent does not except to the fact that approximately two weeks" prior to the election, the respondent approved the rules adopted by the drivers. Nor does respondent explain why it could not wait until after the election to effect the changes in the rules. Therefore regardless of when the first encounter was made, if the adoption of the rules was sufficient to set aside the election, it was correct for the Board to do so, inasmuch as this action unquestionably occurred after

the petition for a representation election was filed. Because respondent's exceptions to the Regional Director's report did not raise any "substantial and material factual issues," but merely disputed its reasoning and conclusions, the Board did not abuse its discretion in denying respondent a hearing on the matter.

Respondent further objects to the Director's action in sustaining the union's fourth objection because the Director "reconstruct(s) union's objection No. 4 making it have an entirely different meaning and on the basis of such reconstruction sets aside the election." The Regional Director's report on this objection dealt with the adoption of new work rules rather than the anti-union petition referred to in objection four. In order to promote an election that is free from coercion, pressure and prejudice, the Regional Director and the Board should have the discretion to consider any facts related to the election, which are uncovered in the course of its investigation. Otherwise the Board would become impotent to carry out the purposes of the Act. In the course of investigating what had happened at the "safety meeting," the Regional Director considered the respondent's role in the adoption and effectuation of the rules. Where related facts concerning misconduct are uncovered in the investigation of the objections filed by a party, it is proper for the Director and the Board to set aside an election on these facts. *N.L.R.B.* v. *Dal-Tex Optical Company*, 310 F.2d 58 (C.A. 5). See also, *Labor Board* v. *Fant Milling Co.*, 306 U.S. 301.

Respondent also claims that it was unlawfully denied a hearing on these same issues in the unfair labor practice charge under direct review herein. Section 160(b), Title 29 U.S.C. provides:

"... The person so complained of shall have the

> right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint."

This requirement, respondent agues, has not been met because it was not permitted to relitigate its objections previously considered by the Board in the certification proceedings. However, it is a well established principle of law that the Board is bound by its own prior determinations in representation proceedings, and is not required to grant a hearing on representational issues ancillary to an unfair labor practice charge, unless the party requesting such a hearing has some newly discovered evidence. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, rehearing den., 313 U.S. 599; *N.L.R.B.* v. *National Survey Service, Inc., supra*; *N.L.R.B.* v. *B. H. Hadley, Inc.*, 322 F.2d 281 (C.A. 9). A party, in the absence of newly discovered evidence, is entitled to only one opportunity to question the Board's certification procedures. To require that the Board reopen and reconsider a matter that was subject to prior consideration would unnecessarily prolong the controversy, and prevent the orderly settlement of labor disputes. Not having presented any newly discovered evidence, the Board was not required, in the present unfair labor practice proceedings, to grant respondent a hearing on its objections to the certification procedures.

Respondent further argues that its conduct in approving and putting into effect the rules adopted by the drivers about two weeks prior to the election, cannot be the basis for setting aside the first election. The Board found that such conduct "interfered with employees' free choice in the election and warrants setting aside the election herein." Our review is limited to

determining whether there is substantial evidence to support this finding. Section 160(e), Title 29, U.S.C. We are not free to consider the issue de novo, and cannot choose between conflicting inferences, even though we might arrive at a different conclusion. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474; *N.L.R.B.* v. *Walton Manufacturing Company*, 369 U.S. 404.

Congress has vested the Board with considerable discretion in supervising and regulating representation elections. *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324; *N.L.R.B.* v. *Blades Manufacturing Corporation*, 344 F.2d 998 (C.A. 8); *National Van Lines, Inc.*, v. *N.L.R.B.* 273 F.2d 402 (C.A. 7); *N.L.R.B.* v. *Shirlington Supermarket*, 224 F.2d 649 (C.A. 4), cert. den. 350 U.S. 914; *Foreman & Clark, Inc.*, v. *N.L.R.B.*, 215 F.2d 396 (C.A. 9), cert. den. 348 U.S. 887. The prime concern of the Board is to assure employees the greatest freedom of choice in the selection of their representatives. This Court, in *N.L.R.B.* v. *Gilmore Industries, Inc.*, 341 F.2d 240, quoted with approval the following statement from Board's decision in *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70 (1962):

> " 'Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.' "

Where pre-election conduct of one of the parties has the undesirable effect of unduly influencing its result, the Board has set aside such election and ordered a new one. The Board has striven to conduct elections in an atmosphere in which employees are free from pres-

sure, coercion and undue influence from either the employer or the union. The Board has determined that elections must take place under "laboratory conditions" to enable employees to express their uninhibited desires. *N.L.R.B.* v. *Blades Manufacturing Corporation, supra; N.L.R.B.* v. *Houston Chronicle Publishing Company*, 300 F.2d 273 (C.A. 5); *Kearney & Trecker Corp.* v. *N.L.R.B.*, 210 F.2d 852 (C.A. 7), cert. den. 348 U.S. 824.

The Board disapproves of an employer's unilateral conferring of economic benefits upon his employees immediately prior to a representation election. It has been held that it is an unfair labor practice in violation of Section 8(a)(1) of the Act. (Section 158(a)(1), Title 29, U.S.C.) to confer such benefits upon employees with the purpose of destroying their freedom of choice or by action calculated to have that effect. *Labor Board* v. *Parts Co.*, 375 U.S. 405; *N.L.R.B.* v. *Frantz and Company*, 361 F.2d 180 (C.A. 7); *Indiana Metal Products Corp.* v. *Labor Board*, 202 F.2d 613 (C.A. 7); *Labor Board* v. *Pyne Molding Corp.*, 226 F.2d 818 (C.A. 2). See also, *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678. It is not necessary that conduct which interferes with the freedom of choice in an election actually constitute an unfair labor practice.

The Board agreed with the Regional Director's conclusion that "the Employer's action in dealing directly with employees and granting a benefit during the critical period (prior to the election) constituted interference with the election," warranting setting aside the election. The respondent insists that the adopted of the rules was merely a "routine decision" to correct any misunderstanding of prior company rules. However, the clarification of such prior work rules did confer a benefit on the majority of drivers who were not missing

runs and assured greater fairness in future assignments. Furthermore if the company had considered the matter of a routine nature, there would be no need to go through the rather formal procedure of organizing a workers' committee to draft the rules and of then calling a ratification meeting of all the drivers. Such a procedure seems calculated to have an effect on the choice of the employees in the election which took place two weeks after the meeting. Respondent did not explain why the change could not have been made after the election. We therefore conclude that the Board was exercising its lawful discretion when it decided to set aside the first election and that its findings are supported by substantial evidence.

The respondent's second assignment of error deals with the Board's certification of the union following the second election. The respondent claims that the appropriate unit included all truck drivers, and that the seven out-of-town drivers had a community of interest with the other drivers. The union contended that their ballots should not be counted because, operating out of town, they were not included within the appropriate bargaining unit as stipulated by the parties. If their ballots and the eighteen ballots, whose challenges the Board overruled, were counted, the outcome of the election might have been effected. In the consent election agreement, the parties stipulated that the appropriate bargaining unit included "all production and maintenance employees including truck drivers at *Tennessee Packers, Inc., Clarksville, Tennessee Plant.*" (Emphasis added.)

Three of these seven drivers resided in Atlanta, Georgia, one in Florence Alabama two in Huntsville, Alabama, and one in Birmingham, Alabama. These seven performed their services for the company in the

cities wherein they resided and their surrounding communities. With the exception of the employee who resided in Birmingham, the duties of these employees were similar. Each day, respondent dispatched a truck from the Clarksville plant to each of the respective cities. The employee driver who resided there would meet the driver at a pre-arranged place, and make local deliveries. The over-the-road driver either slept until the local driver completed his deliveries and then drove the truck back to Clarksville, or drove back in an empty truck that was delivered the previous day. The employee driver who resided in Birmingham, drove his truck to Clarksville each Sunday and Wednesday and picked up a load he delivered the following day in Birmingham.

Respondent takes the position that the Stipulation for Certification Upon Consent Election included all drivers in the appropriate unit regardless of their residence or base of operation, and that the out-of-town drivers have a community of interest with the Clarksville drivers, and therefore should be part of the same bargaining unit. The Board found that the out-of-town drivers were not intended to be included in the stipulated unit and that they did not have such a community of interest as to warrant their inclusion in the plant unit. The Board therefore refused to count their ballots.

Ordinarily when an issue is raised as to the Board's determination of an appropriate bargaining unit, our review is limited to ascertaining whether the Board abused its wide discretion, or acted capriciously, in fixing such a unit. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, rehearing den., 331 U.S. 868, motion denied, 332 U.S. 823; *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485; *N.L.R.B.* v. *Winn-Dixie*

Stores, Inc., 341 F.2d 750 (C.A. 6), cert. den., 382 U.S. 830. However, when the parties stipulate an appropriate bargaining unit, the Board may not enter into an independent determination of a unit, but is bound by the stipulation. *Tidewater Oil Company* v. *N.L.R.B.*, 358 F.2d 363 (C.A. 2); *N.L.R.B.* v. *J. J. Collins' Sons, Inc., supra; N.L.R.B.* v. *Joclin Manufacturing Company, supra.* In instances where the inclusion or exclusion of a particular employee within the stipulated unit violates some settled Board policy or statutory provision the Board may take these countervailing policies into account. *Tidewater Oil Company* v. *N.L.R.B., supra.* The Board will consider matters of practical significance only if the stipulation is ambiguous. *N.L.R.B.* v. *Joclin Manufacturing Company, supra.* Geographical restrictions contained in such stipulations are not to be ignored. *Tidewater Oil Company* v. *N.L.R.B., supra; N.L.R.B.* v. *Joclin Manufacturing Company, supra.* The primary concern in cases where there is a stipulated unit is the determination of the intention of the parties.

The unit under discussion herein included "truck drivers at Tennessee Packers, Inc., Clarksville, Tennessee Plant." The language itself seems unambiguous in setting up a geographical limitation on the appropriate bargaining unit. It is limited to truck drivers at the Clarksville plant. If the parties had intended to include all truck drivers wherever located it would have been simple for the language to so indicate. The stipulation could have been to the effect that the unit included "all production and maintenance employees at Tennessee Packers, Inc., Clarksville, Tennessee Plant, and all truck drivers." But the stipulation reads to the contrary. No Board policy is violated by such a limitation, and the parties are bound by their stipulation.

However, even if we held that the stipulation was ambiguous, the Board's finding that the lack of a community of interest between the Clarksville and out-of-town drivers did not warrant the latter's inclusion within the unit is supported by substantial evidence. Section 160(e), Title 29, U.S.C. If the evidence is susceptible of two or more inferences we are not at liberty to draw an inference different from the one drawn by the Board even though it may seem more plausible and reasonable to us. *Universal Camera Corporation* v. *N.L.R.B., supra; N.L.R.B.* v. *Walton Manufacturing Company, supra.* Reviewing the evidence in this case, the Board was justified in concluding that the out-of-town drivers did not have a community of interest with the Clarksville drivers. The only contact the out-of-town drivers had with the Clarksville drivers was when they met to exchange or deliver trucks. Because of the distances involved it would be difficult for the out-of-town drivers to attend union meetings. Therefore the Board did not err when it concluded that the physical separation of the out-of-town drivers and the Clarksville drivers precluded a finding of a community of interest sufficient to include the out-of-town drivers within the appropriate bargaining unit. There is substantial evidence to support the action of the Board in its certification of the union and in its finding that the respondent violated Section 8(a)(5) and (1) of the Act (Section 158(a)(5) and (1), Title 29, U.S.C.) by refusing to bargain collectively with the union.

The Board's petition for enforcement will be granted.

APPENDIX B

JUDGMENT OF THE COURT BELOW

Order Filed June 21, 1967
In No. 17, 125 in the United States Court of Appeals
For the Sixth Circuit

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board be and the same is granted and the order is hereby enforced.

No costs awarded. Rule 23(4).

Entered by order of the Court.
(Signed) CARL W. REUSS
Clerk

APPENDIX C

OPINION AND JUDGMENT OF THE ADMINISTRATIVE AGENCY INVOLVED

Decision and Order
Of the National Labor Relations Board
In Case No. 26-CA-2053

(Copy from p. 3a through 17a of the book furnished.)

On June 10, 1965, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Decision and Order

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner. [1]

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[1] We affirm the Trial Examiner's refusal to permit the Respondent to relitigate in this complaint proceeding its objections previously considered by the Board in the representation proceeding, Case No. 26-RC-2030. On July 6, 1965, the Respondent filed a Motion to Reconsider the Board's Supplemental Decision and Certification of Representative issued on December 11, 1964, in Case No. 26-RC-2030. This motion was denied on August 5, 1965. The Respondent's exceptions to the Trial Examiner's Decision rely upon the same arguments advanced in the recent Motion to Reconsider and are clearly without merit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Tennessee Packers, Inc., Frosty Morn Division, Clarksville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., August 31, 1965.

Frank W. McCulloch, *Chairman*

Gerald A. Brown, *Member*

Howard Jenkins, Jr., *Member*
National Labor Relations Board

(Seal)

TRIAL EXAMINER'S DECISION

Statement of the Case

Based upon a charge filed on March 11, 1965 by the above Union against Respondent Employer, the Twenty-sixth Regional Director of the Board on April 5, 1965 issued a Complaint alleging that notwithstanding the fact that following a Board-conducted secret election the Board on December 11, 1964 had certified the Union as exclusive bargaining representative of an appropriate unit of Respondent's employees, Respondent has continued to refuse to recognize, meet or bargain with the Union, in violation of Section 8(a)(5) and (1) and in deprivation of employee rights guaranteed in Section 7 of the National Labor Relations Act as amended, 29 U.S.C. Sec. 151 *et seq.* Upon Respondent's Answer admitting it has continued to

refuse to recognize, meet or bargain with the Union, while generally denying certain other material allegations of the complaint, General Counsel on April 16 moved for relief in the nature of judgment on the pleadings, striking out the Answer and providing appropriate remedy. On April 22, the undersigned issued an order requiring Respondent to show cause on or before May 5 why this motion should not be granted. Respondent's papers in response to this order were received on May 10, and thereafter General Counsel's papers in reply.

All pleadings, papers, and proceedings herein, and in underlying Board Case No. 26-RC-2030, of which official notice is taken herein, having been fully considered, upon the basis thereof I make the following:

Findings and Conclusions

I. Respondent's business; labor organization involved

In its Answer Respondent admits, and I find, that at all material times Respondent has been and is a Tennessee corporation with its plant and principal place of business in Clarksville, Tennessee, where it is engaged in processing meat and meat products; that during the 12-month period preceding issuance of the complaint Respondent in the course and conduct of its said business operations sold and shipped finished products valued in excess of $50,000 directly to points outside the State of Tennessee; that at all of said times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and that at all of said times the Union has been and is a labor organization within the meaning of Section 2(5) of the Act. I further find that assertion of jurisdiction herein is proper.

II. The alleged unfair labor practices

As has been indicated, Respondent Employer is charged with refusal to recognize, meet or bargain with the Union although it has been duly certified by the Board under the Act following a Board-conducted secret election. The issues tendered by Respondent's Answer to the Complaint, as well as by its papers in opposition to General Counsel's motion for judgment on the pleadings, will now be considered.

A. *Issues tendered by Respondent's Answer*

The following chart recapitulates the allegations of the Complaint and the responsive pleadings in the Answer. The extreme right column contains the Trial Examiner's comments based upon the record.

Complaint Par. No.	Complaint Allegation	Answer Allegation	Trial Examiner's Comments
1	Charge filed & served 3/11/65	Admitted	
2, 3, 4, & 5	Jurisdictional facts re Employer & Union	Admitted	
6(a)	Supervisory status of Respdt's Plant Supt. & Gen. Mgr.	Admitted	
6(b)	Agency status of Respdt's attorney	Denied	Immaterial for purposes of present motion.
7	Description of appropriate unit	Denied	1. This unit was stipulated to by Respondent in writing on 9/11/63 in Case No. 26-RC-2030. 2. This unit was established by the Board in its Decision of 12/11/64. in Case No. 26-RC-2030.
8	Selection of Union as bargaining representative in Board-conducted secret election on 6/19-20/64, and Board certification of Union on 12/11/64	Denied	Established in Board Decision ("Supplemental Decision and Certification of Representative") of 12/11/64 in Case No. 26-RC-2030.

9	Union has been and is exclusive bargaining representative of unit employees under Act Sec. 9(a)	Denied	Legal conclusion flowing from facts alleged in Complt., Pars. 7 & 8, established by Board Decision of 12/11/64 in Case No. 26-RC-2030.
10	Since 12/22/64 Union has been requesting Respdt to bargain with it on behalf of unit employees	Admitted	
11	Since 12/22/64 Respdt has continued to refuse to recognize, meet, or bargain with Union as representative of unit employees	Admitted	
12	By acts described in Complt. Par. 11, Respdt has violated Act Sec. 8(a)(1), depriving employees of their Sec. 7 rights	Denied	Conclusory allegations flowing from facts alleged in preceding paragraphs of Complt.
13 (final)	By acts described in Complt. Par. 11, Respdt has violated Act Sec. 8 (a)(5)	Denied	Conclusory allegations flowing from facts alleged in preceding paragraphs of Complt.

In view of the state of the pleadings as shown by the foregoing chart, I issued the order requiring Respondent to show cause why General Counsel's motion for relief in the nature of judgment on the pleadings should not be granted and the Answer stricken out. A copy of the order to show cause is appended (Appendix A).

B. *Issues tendered by Respondent's response to order to show cause*

The order to show cause allowed Respondent ample time to file "any and all papers, exhibits, and briefs (including, if so advised, proposed findings of fact and conclusions of law, with supporting reasons therefor [1]), in opposition to said motion and to the granting of the relief sought thereby." The only document filed by Respondent is captioned "Amendment to Answer

[1] Administrative Procedure Act, 5 U.S.C.A. Sec. 1007 (b).

showing cause why decision should not be rendered against Respondent on the pleadings." [2] While not withdrawing any of the admissions contained in the original Answer, the document purports "by adding to its answer in regard to the allegations contained in paragraphs 10 and 11" to explain why Respondent in its opinion is "not obligated to bargain" with the Union. The explanation is twofold; first, that an earlier election (1963) than the one (1964) resulting in the Union's certification was for various reasons improperly set aside by the Board; and second, that even if the earlier (1963) election was properly set aside by the Board, the Board's decision with regard to challenged ballots and the parties' stipulation for consent election "was erroneous both as to fact and to law as to the 1964 election."

The order to show cause herein expressly required, with regard to any papers to be filed in response to General Counsel's motion:

> "that any papers so filed shall include plain, concise, and separately numbered statements of each and every alleged triable issue which Respondent contends is raised by the pleadings herein and which is required to be litigated at a hearing, together with a written offer to proof in support of each thereof sufficient clearly to identify in substance the proof proposed to be adduced in support of each such separately numbered alleged triable issue."

Respondent does not appear to have complied with this requirement, nor has it advanced any reason for not complying. The document filed by it fails to num-

[2] No application or leave was sought to amend the answer. Cf. Board Rules and Regulations, Series 8 as amended, Sec. 102.23. The document is here treated as an amended answer and its contents considered accordingly.

ber and set forth triable issues as required, and fails to set forth the proof proposed to be adduced in support of each such separately numbered alleged triable issue; thereby obscuring the matters raised by General Counsel's motion, and rendering nugatory, by noncompliance with the order to show cause, the Trial Examiner's attempt to define and bring into fair and sharp focus all issues tendered by Respondent.

Analysis of the record in underlying Representation Case No. 26-RC-2030, officially noticed herein, indicates that the document filed by Respondent in purported compliance with the order to show cause merely reiterates certain contentions or arguments which were either heretofore raised by Respondent and disposed of by the Board, or which could have been raised by Respondent before the Board, in Case No. 26-RC-2030 resulting in the Board's December 11, 1964 Supplemental Decision and Certification of Representative; upon the basis of which contentions Respondent now maintains that the Board erred in its December 11, 1964 Decision and Certification or actions which preceded it.

There is no contention by Respondent as to any newly discovered evidence, nor is there any basis for concluding that any may be involved. Indeed, even the arguments now raised by Respondent were advanced before the Board and disposed of in the Representation case.[3] Indeed, comparison of Respondent's current

[3] Thus, Respondent now reiterates the following contentions raised before and disposed of by the Board in Representation Case No. 26-RC-2030:- (1) That the election of 1963 was improperly set aside by the Board on the basis of a meeting of employees called by Respondent, allegedly held prior to the "cutoff date"; but that even if that meeting was held after the "cutoff date" there was no grant of benefits or change in conditions of employment, but merely reduction to writing of existing practice in regard to truckdrivers. In support of this contention, Respondent again (as it did before the Board) urges that Union Objection No. 4 to the election refers to a meeting of employees called by Respondent, at which Respondent told them to sign a petition disavowing the Union, whereas the Regional Director in his report sustaining the objections re-

"Amendment to Answer showing cause why decision should not be rendered against Respondent on the pleadings" with Respondent's December 13, 1963 "Exceptions to Report on Challenged Ballots and Objections" of the Regional Director dated December 6, 1963, shows not only that the same arguments are now sought to be renewed before the Trial Examiner which failed before the Board, but that a substantial portion of Respondent's current "Amendment to Answer" is a verbatim copy of its December 13, 1963 Exceptions which were disposed of by the Board. Respondent thus appears to be seeking to have the Trial Examiner reverse or reopen the Board's December 11, 1964 Decision and Certification. It is unnecessary to state that the Trial Examiner lacks such power; and it should be unnecessary to remind Respondent that if it desires reopening or reargument of the Representation case, its request should be addressed to the Board, which decided it.

It has repeatedly been held that the Trial Examiner is bound by the Board's determinations in antecedent Representation cases, noncompliance with which forms the basis for a Section 8(a)(5) unfair labor practice charge; and that issues which were or could have been litigated in the Representation case may not—barring special circumstances not here shown, claimed, or present—be relitigated in the subsequent unfair labor practice case. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*,

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fers to it as a meeting at which Respondent approved truckdrivers rules effecting a beneficial change in their working conditions. Respondent contends that this finding of the Regional Director was unwarranted and that it had no opportunity to meet it. Respondent's Exceptions filed with the Board to the Regional Director's report show conclusively, however, that Respondent made the very same contention before the Board, which rejected it. (2) That even if the 1963 election was properly set aside, the Board's decision on the challenged ballots and its construction of the parties' 1963 consent election stipulation was erroneous in relation to the 1964 election. This likewise was litigated before the Board and passed upon by it in its December 11, 1964 Supplemental Decision and Certification of Representative.

313 U.S. 146, 158, 161-162.[4] There is here no claim or basis for concluding that any evidence now proposed to be adduced was previously unavailable or that it relates to events subsequent to the Board's decision in the Representation case.[5] Nor would acceptance in the subsequent unfair labor practice case of proffered proof which could have been advanced in the Representation case be proper in order to vary the result thereof. *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, *supra*, 313 U.S. at 161-162; *Olson Rug Company* v. *N.L.R.B.*, 260 F. 2d 255 (C.A. 7); *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, *supra*, 162 F. 2d at 440-441; *N.L.R.B.* v. *Norfolk Southern Bus Corp.*, 159 F. 2d 516 (C.A. 4), enforcing 66 NLRB 1165, 1174, cert. denied, 330 U.S. 844; *N.L.R.B.* v. *West Kentucky Coal Co.*, *supra*, 152 F. 2d at 200-201. The same would be true as to any current attempt to proffer proof of objections previously asserted but unsupported by proof in the Representation case, since such failure amounted "in law and in fact to a waiver or abandonment of them, and the [Regional] Director and Board were right in their position that, since respondent [employer] had not undertaken to support them, they would not be considered as presenting any vice in the election." *N.L.R.B.* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433 (C.A. 5).

In view of the foregoing, it is clear that neither

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[4] See also: *N.L.R.B.* v. *Quaker City Life Insurance Company*, 319 F. 2d 690 (C.A. 4); *N.L.R.B.* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74 (C.A. 5); *N.L.R.B.* v. *Burroughs Corporation*, 261 F. 2d 463, 465-466 (C.A. 2); *N.L.R.B.* v. *American Steel Buck Corp.*, 227 F. 2d 927, 929 (C.A. 2); *N.L.R.B.* v. *Esquire, Inc.*, 222 F. 2d 253, 255 (C.A. 7); *N.L.R.B. vv. Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), cert. denied, 336 U.S. 903; *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 162 F. 2d 435, 440-441 (C.A. 7); *N.L.R.B.* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 200-201 (C.A. 6), cert. denied, 328 U.S. 866; *Lamar Hotel*, 140 NLRB 226, 229, enforced, 328 F. 2d 600 (C.A. 5), cert denied, U.S. ___; *Mountain States Telephone & Telegraph Co.*, 136 NLRB 1612, 1615, enforced, 310 F. 2d 478 (C.A. 10).

[5] *Singer Sewing Machine Company* v. *N.L.R.B.*, 329 F. 2d 200, 204, 206 (C.A. 4).

Respondent's Answer nor its paper filed in opposition to General Counsel's motion raises a triable issue. "Neither the statute, nor the Constitution, gives a hearing where there is no issue to decide." *Fay* v. *Douds, Regional Director*, 172 F. 2d 720, 725 (C.A. 2). See also, *Harvey Aluminum (Incorporated)* v. *N.L.R.B.*, 335 F. 2d 749, 757-758 (C.A. 9); *N.L.R.B.* v. *Clearfield Cheese Company*, 322 F. 2d 89, 92, 93 (C.A. 3); *Producers Livestock Marketing Assn.* v. *United States*, 241 F. 2d 192, 196 (C.A. 10), affirmed, 356 U.S. 282, and cases therein cited. There being no triable issue and therefore no necessity for the taking of testimony herein upon the pleadings and papers presented, General Counsel's motion for relief in the nature of judgment upon the pleadings is hereby granted, Respondent's Answer and Amended Answer are stricken out, and Respondent's offers of proof [6] are rejected. [7]

In accordance with the request for relief in the moving papers, and upon the entire record (including the record in Board Case No. 26-RC-2030), I state the following:

III. Findings of Fact and Conclusions of Law

1. At all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. At all material times the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truckdrivers, at Respondent's Clarksville, Ten-

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[6] It is noted that some of these are purely perfunctory or conclusionary, contrary to the requirements of the order to show cause.

[7] Cf. *Diversey Corporation* v. *N.L.R.B.*, 325 F. 2d 489, 490-491 (C.A. 7); *K.V.P. Sutherland Paper Co.*, 143 NLRB 834, 836-837.

nessee, plant, excluding all office clerical employees, clerical employees, salesmen, part-time employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On June 19 and 20, 1964, a majority of Respondent's employees in the unit stated above, by a secret ballot election conducted under the supervision of the Regional Director, Twenty-sixth Region, National Labor Relations Board, in Case No. 26-RC-2030, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent and on December 11, 1964 the Board certified the Union as the exclusive collective bargaining representative of the employees in said unit.

5. At all times since June 20, 1964, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit stated above, and, by virtue of Section 9(a) of the Act, has been and is the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. Commencing on or about December 22, 1964, and continuing to date, the Union has requested and is requesting Respondent to bargain collectively with it with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective bargaining representative of all of Respondent's employees in said unit.

7. Commencing on or about December 22, 1964, and at all times thereafter, Respondent has refused

and continues to refuse to recognize, meet with, or bargain collectively with the Union as the exclusive collective bargaining representative of all employees in said unit, notwithstanding the fact that the Union has at all of said times been and is the duly designated and National Labor Relations Board-certified exclusive collective bargaining representative of all of Respondent's employees in said unit.

8. By refusing to recognize, meet and bargain with the Union as the exclusive collective bargaining representative of Respondent's employees in said unit on or about and since December 22, 1964, Respondent has:

(a) refused and is refusing to bargain collectively with the representatives of its employees, and has thereby engaged and is engaging in unfair labor practices in violation of Section 8(a)(5) of the Act;

(b) interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of rights guaranteed to said employees in Section 7 of the Act, and has thereby engaged and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall also recommend that Respondent be required to post an appropriate notice.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby make the following:

RECOMMENDED ORDER

Tennessee Packers, Inc., Frosty Morn Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing or failing to recognize, meet with, or bargain collectively in good faith with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Local No. 405, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including truckdrivers, at Respondent's Clarksville, Tennessee, plant, excluding all office clerical employees, clerical employees, salesmen, part-time employees, watchmen, guards and supervisors as defined in the Act.

(b) Interfering with the efforts of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 405, to meet with Respondent and to negotiate for or represent the employees in the above unit as their exclusive bargaining representative.

(c) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act as amended, through refusing or failing to recognize, meet with, or bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,

Local No. 405, as the exclusive bargaining representative of its employees in said unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize, meet and bargain collectively in good faith with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 405, as the exclusive representative of all of Respondent's employees in the appropriate unit described in paragraph 1(a) above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post in its plant and premises in Clarksville, Tennessee, copies of the notice attached hereto marked Appendix B.[8] Copies of said notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places,

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[8] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-sixth Region, in writing, within 20 days from the receipt of this Decision and Recommended Order, what steps have been taken to comply therewith.*

Dated at Washington, D. C., June 10, 1965.

/s/ Stanley N. Ohlbaum
Trial Examiner

APPENDIX D

ORDER STAYING MANDATE

Order of the United States Court of Appeals
For the Sixth Circuit Filed August 7, 1967

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless

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* In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

this condition is complied with within such thirty days or any extension thereof made by the Court of any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by order of the Court.

(Signed) CARL W. REUSS
Clerk